

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
(CENTRAL DIVISION)**

**MICHAEL DAWE,
Plaintiff**

v.

**CAPITAL ONE BANK,
Defendant.**

C.A. No. 04-40192

**DEFENDANT'S MOTION FOR LEAVE TO FILE
BRIEF REPLY TO PLAINTIFF'S OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT**

Defendant Capital One Bank ("Capital One") moves pursuant to Local Rule 7.1(B)(3) for leave to file, on or before December 1, 2006, a brief reply to plaintiff's memorandum in opposition to Capital One's motion for summary judgment on all of the plaintiff's claims.

In his memorandum, the plaintiff raises a number of issues for the first time that warrant a brief reply in order to permit Capital One to clarify the applicable law and address a number of other issues presented by the plaintiff's eleventh-hour assertions prompted, no doubt, by, as the plaintiff concedes, the "extensive deleterious impact" on the plaintiff's case of the Court's decision on Capital One's motion for partial summary judgment in which the Court held that the plaintiff's debt to Capital One was not extinguished by the dismissal of the state court collection action.

Most significantly, the plaintiff asserts for the first time (without any supporting record evidence) that Capital One violated the Fair Credit Reporting Act, Mass. General Laws Chapter 93A, and various common law rights by failing "to note on Mr. Dawe's credit histories the fact that the alleged debt was in dispute and that Defendant could not use the courts to enforce the alleged obligation" and by failing to conduct a "reasonable investigation." No mention of these allegations – or any facts supporting them - appears anywhere in the complaint or in any of the

plaintiff's responses to any of Capital One's discovery requests, which included requests that specifically required the plaintiff to explain the factual basis for his claims, and, in any event, these newly-manufactured allegations are unsupported by the record on summary judgment or by applicable law.

A brief reply by Capital One with respect to these ill-conceived allegations and a number of other futile arguments by the plaintiff in opposition to Capital One's motion for summary judgment will assist the Court in reviewing the issues presented by Capital One's motion on all of the plaintiff's claims.

Accordingly, Capital One requests leave to file a brief memorandum in reply to the plaintiff's memorandum in opposition to Capital One's motion for summary judgment on or before December 1, 2006.

Respectfully submitted,

CAPITAL ONE BANK

By its attorney,

/s/ Bruce D. Berns

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